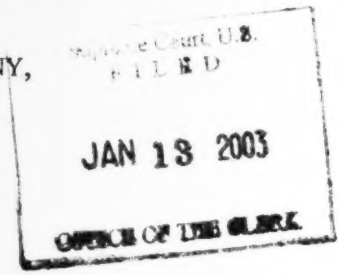
(2) (3) (2)

NOS. 02-692, 02-705, 02-736

IN THE

Supreme Court of the United States

ARCHER-DANIELS-MIDLAND COMPANY,
Petitioner,
v.
DELLWOOD FARMS, INC., ET AL.,
Respondents.



CARGILL, INCORPORATED,
Petitioner,
v.
A&W BOTTLING, INC., ET AL.,
Respondents.

A.E. STALEY MANUFACTURING COMPANY,
Petitioner,
v.
DELLWOOD FARMS, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Seventh Circuit (Posner, J.) correctly apply the standards enunciated in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in denying summary judgment for the defendants where the evidence in the record was more consistent with an unlawful horizontal agreement to fix prices than with permissible competition?

2. Where the courts of appeals, including the court below, have uniformly applied *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976), to allow an adverse inference to be drawn where warranted against a party when related non-parties invoke the Fifth Amendment in civil actions, should this Court grant review to address the issue in this interlocutory appeal when its resolution played no part in the outcome below?

STATEMENT PURSUANT TO RULE 29.6

Respondent A & W Bottling, Inc. is privately held and has no parent corporation.

Respondent Carteret Packaging, Inc. is privately held and has no parent corporation.

Respondent Dellwood Farms, Inc. was merged into respondent Tuscan Dairy Farms, Inc.

Respondent E.B. Evans Food Company is privately held and has no parent corporation.

Respondent Golden Eagle, Inc. is privately held and has no parent corporation.

Respondent Grist Mill Company is wholly owned by Conagra Foods, Inc., a publicly held corporation, of which State Street Bank, as trustee, holds 36%.

Respondent Mohawk Distilled Products, Inc. is a limited partnership whose general partner is a privately held French company.

Respondent Pepsi-Cola Bottling Company of Olean is privately held and has no parent corporation.

Respondent Publix Supermarkets, Inc. is a publicly traded corporation, substantially all of whose common stock transactions have been among the company, its employees, former employees, their families and the benefits plans established for the company's employees. Huntington National Bank owns 11.97% of Publix. Huntington National Bank is wholly owned by Huntington Bancshares, Inc., of which no publicly traded company holds 10% or more of its shares.

Respondent Rite Foods, Inc. is privately held and has no parent corporation.

Respondent Seven Up Bottling Company of Jasper is privately held and has no parent corporation.

Respondent Sun-Dew Sales Corp. was merged into respondent Dellwood Farms, Inc., which in turn was merged into respondent Tuscan Dairy Farms, Inc.

Respondent Tom's Foods, Inc. is owned indirectly and ultimately by Heico Holdings, Inc., Allstate Insurance Company, TCW Shared Opportunity Fund L.P. and certain individuals.

Respondent Tuscan Dairy Farms, Inc., assigned its assets to Tuscan/Lehigh Dairies, L.P., the general partner of which is Tuscan/Lehigh Management, LLC, which is wholly owned by Dean Northeast, LLC, which is wholly owned by Suiza Dairy Group L.P., whose sole general partner is Suiza Dairy Group Holdings, Inc., which is wholly owned by Dean Foods Company, formerly known as Suiza Foods Corporation, which is a publicly traded company. Fidelity Management and Research Company is the beneficial holder, by virtue of Fidelity's acting as an investment advisor to various investment companies, of 13.052% of Dean Foods Company. Fidelity Management and Research Company is wholly owned by FMR Corp. FMR Corp. is privately held.

Respondent Vineland Syrup, Inc. is privately held and has no parent corporation.

Respondent Vita Food Products, Inc. is a publicly traded corporation with no publicly held company owning 10% or more of its stock.

Respondent Wells Dairy, Inc. is privately held and has no parent corporation.

Respondent Zarda Enterprises, formerly doing business as All Star Bottling, is privately held and has no parent corporation.

Respondents represent a class of United States purchasers of high fructose corn syrup ("HFCS") from July 21, 1991 through June 30, 1995, which includes manufacturers of soft drinks, canned goods, baked goods, confectionery products, dairy products and others.

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OTHER SOURCES

Kenneth G. Elzinga, *New Developments on the Cartel Front*, 29 Antitrust Bulletin 3 (Spring 1984) 18

Neil H. Jacoby, *The Relative Stability of Market Shares: A Theory and Evidence from Several Industries*, 12 J. Indus. Econ. 82 (1964) 18

Richard A. Posner, *Antitrust Law* (2d ed. 2001) 14

INTRODUCTION

This case involves a straightforward application of conventional summary judgment standards to a unique set of facts. A unanimous panel of the Seventh Circuit held that the summary judgment record demonstrated sufficient facts to justify a trial on the alleged horizontal price-fixing conspiracy. Crg App. 19a.[1] Without dissent, the Seventh Circuit rejected *en banc* reconsideration. *Id.* 95a. While petitioners obviously do not like the decision below, there is no conflict with this Court's decisions and no circuit conflict. There is also no circuit conflict on the tangential evidentiary issue raised by petitioner ADM concerning the invocation of the Fifth Amendment, an issue not relied on in reversing summary judgment. The fact-specific decision below is not "certworthy."

The Seventh Circuit applied the standard announced in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in examining the evidence in this case. In *Monsanto*, 465 U.S. at 764, and in *Matsushita*, 475 U.S. at 588, this Court stated the rule "that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."

The court below examined the HFCS market structure, Crg. App. 6a-10a, and found it "auspicious for price fixing," *id.* 14a. It reviewed the economic "evidence of

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[1] The petition for a writ of certiorari of Archer-Daniels-Midland Company ("ADM") in No. 02-692 is identified as "ADM Pet.," of Cargill, Incorporated ("Cargill") in No. 02-705 as "Crg. Pet.," and of A.E. Staley Manufacturing Company ("Staley") in No. 02-736 as "St. Pet." Citations to the opinions and order of the court of appeals and the district court are to the appendix to Cargill's petition identified as "Crg. App."

noncompetitive behavior," *id.* 10a-14a, and found that "defendants avoided or at least limited price competition" *id.* 14a. Nonetheless, because "all of this evidence is consistent with the hypothesis that [defendants] had a merely tacit agreement," *id.* 14a, "that is, an agreement made without any actual communication among the parties to the agreement," *id.* 2a, these findings were *not* the court's basis for deciding summary judgment was unwarranted.

Matsushita further requires plaintiffs to "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently . . ., *in other words*, [to] show that the inference of conspiracy is reasonable in light of the competing inference[] of independent action." 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764) (emphasis added).

Citing *Matsushita*, the Seventh Circuit applied this test. After describing the economic evidence outlined above, it examined *additional* evidence to determine

> whether there is *enough evidence for a reasonable jury to find that there was an explicit agreement*, not merely a tacit one. . . . Another and equivalent way to put this is that they [the plaintiffs] must present evidence that would enable a reasonable jury *to reject the hypothesis that the defendants foreswore price competition without actually agreeing to do so.* See, e.g., *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

Crg. App. 15a (emphasis added).

After reviewing and summarizing some of, but not all, the additional evidence respondents presented in this case, the court of appeals found it "highly suggestive of the existence of an explicit though of course covert agreement to fix

prices." *Id.* 19a. "Highly suggestive" evidence of a conspiracy "*tends* to exclude" independent behavior and would permit a reasonable jury to infer such a conspiracy. The Seventh Circuit thus complied with the dictates of *Matsushita*.

Petitioners' position boils down to no more than the contention that the Seventh Circuit was required to quote the phrase "tends to exclude" in its opinion. Crg. Pet. I, 3, 8, 12-13, 15-20, 24, 26-28, 30; St. Pet. 2, 3, 11, 13, 15, 17-19, 21; ADM Pet. 28. However, a court is not required to use any particular verbal formulation in announcing its decision; the law is not made up of "magic words." Despite petitioners' contrary claims (Crg. Pet. 3; St. Pet. 3; ADM Pet. 25-26), the court below not only cited *Matsushita*, it applied the substantive law set out in *Matsushita* and *Monsanto*.

REASONS FOR DENYING THE PETITIONS

I. The Court Of Appeals Used The Proper Summary Judgment Standard.

A. The Court of Appeals' Opinion Represents a Routine Application of *Matsushita* and *Monsanto*.

Judge Posner's opinion for the Seventh Circuit is a routine and correct application of summary judgment standards. Under Rule 56(c), Fed. R. Civ. P., in determining whether "there is [a] genuine issue as to any material fact," courts are required to draw every reasonable inference from the evidence in favor of the non-moving party. See *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 468 (1992) (citing, among others, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). This applies in antitrust cases. See, *e.g.*, *id.*, 504 U.S. at 468. As this Court has made clear, *Matsushita* is merely an articulation in the antitrust conspiracy context of the ordinary rule that "the nonmoving

party's inferences [must] be reasonable in order to reach the jury." *Id.*

In *Matsushita*, this Court explained that substantive "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," such that "conduct *as consistent with* permissible competition as with illegal conspiracy does not, *standing alone*, support an inference of antitrust conspiracy." 475 U.S. at 588 (emphasis added). In explaining how to apply this rule, the Court stated alternative formulations of the standard a plaintiff alleging an antitrust conspiracy must meet to survive a defendant's motion for summary judgment. First, it said:

> [A] plaintiff must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.

Id. (quoting *Monsanto*, 465 U.S. at 764). The Court then immediately paraphrased this standard:

> *[I]n other words*, [a plaintiff] must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff].

475 U.S. at 588. (emphasis added). In asserting that the court below failed to utilize the test articulated in *Matsushita*, petitioners repeatedly and misleadingly quote only the phrase "tends to exclude," and not the alternative formulation. In doing so, they fundamentally distort the relevant summary judgment standard established by this Court and ignore the analysis employed by the court below.

1. The court below correctly applied *Matsushita*.

a. The structure of the market

The court of appeals here applied the test articulated in *Matsushita*. It first examined the structure of the HFCS market to see whether the market was "one in which secret price fixing might actually have an effect on price and thus be worth attempting." Crg. App. 6a. After a detailed review of the market structure in light of economic principles, the court concluded that "the structure of the market was conducive to such [unlawful] behavior." *Id.* 10a.

b. Non-competitive behavior

The court then turned to "the evidence of noncompetitive behavior." *Id.* It found that, at the outset of the alleged conspiracy, ADM, followed quickly by the other defendants, raised the price of HFCS 42 to 90% of the price of HFCS 55. *Id.* It concluded that petitioners' explanations for this pricing change did "not counter an inference of price fixing." *Id.* 10a-11a. The court further found that, a few months later, the petitioners all changed their contracts from annual to quarterly, shifting risk to their customers, while raising prices. *Id.* 11a. It observed, "That is not competitive behavior." *Id.*

The court below also found that the defendants purchased HFCS from each other to sell to customers, even though each purchaser had excess capacity and could have manufactured the product at a lower price, and that this practice ended when the alleged conspiracy ended. *Id.* 11a-12a. "The possibility that springs immediately to mind is that this is a way of shoring up a sellers' cartel by protecting the market share of each seller." *Id.* 12a. And, despite growth in the market for HFCS, the court of appeals found that market shares remained stable – an indicium of an "agree[ment]

tacit[] or otherwise to share the sales opportunities created by the growth in demand."[2] *Id.* 13a.

In addition, the court of appeals found that plaintiffs' economic expert's regression analysis was "some . . . evidence that higher prices during the period of the alleged conspiracy cannot be fully explained by causes consistent with active competition." *Id.* 14a.

c. Requirement and evidence of explicit agreement

However, because the court below found all this evidence was consistent with a tacit agreement, it did not reverse the grant of summary judgment on this basis. Rather, it took the further step of examining the record to see if plaintiffs had adduced additional evidence sufficient to satisfy the test articulated in *Matsushita*. Given the misleading statements in the petitions, it is appropriate to quote the critical paragraph at length:

> To summarize the discussion to this point, there is evidence both that the HFCS market has a structure that is auspicious for price fixing and that during the period of the alleged conspiracy the defendants avoided or at least limited price competition. But as the defendants point out . . . all of this evidence is consistent with the hypothesis that they had a merely tacit agreement, which at least for purposes of this

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[2] Cargill argues that its market share increased significantly compared to the other HFCS producers. Crg. Pet. 7-8. The court of appeals rejected this argument: "[H]ad they [market shares] gyrated wildly, this would be some evidence of active competition. The defendants argue that they did gyrate wildly, but their evidence involves comparing pre-conspiracy (1988) market shares with market shares during the period of the alleged conspiracy (the district court followed them in this mistake)." Crg. App. 12a-13a.

> appeal the plaintiffs concede is not actionable under section 1 of the Sherman Act. *The question then becomes whether there is enough evidence for a reasonable jury to find that there was an explicit agreement, not merely a tacit one.* To repeat, there is evidence that the defendants were not competing; we might go so far as to say they had tacitly agreed not to compete, or at least to compete as little as possible; but the plaintiffs must prove that there was an actual, manifest agreement not to compete. *Another and equivalent way to put this is that they must present evidence that would enable a reasonable jury to reject the hypothesis that the defendants foreswore price competition without actually agreeing to do so.*[3] See, e.g., *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

Crg. App. 14a-15a (emphasis and footnote added).

The court of appeals then examined *some* of the further evidence of an explicit agreement and determined that it was "highly suggestive of the existence of an explicit though of course covert agreement to fix prices."[4] *Id.* 19a. As described by the court, this evidence was:

- "[T]he alleged HFCS conspiracy began shortly after [Terrence] Wilson became head of ADM's corn products division – which raises the question why, if as the defendants argue the 90 percent rule and the other parallel behavior that is the plaintiffs' evidence of a lack of price competition in the HFCS market were just the natural expression of the

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[3] There is no material difference between the phrase "reject the hypothesis" and the phrase "tends to exclude," on which petitioners rely so heavily.

[4] The court stated that there was "some more evidence," but that the evidence it summarized was "enough" to defeat petitioners' motion for summary judgment. Crg. App. 18a-19a.

oligopolistic structure of the market, this behavior should have begun when Wilson, later to be imprisoned for price fixing [lysine], took charge of ADM's HFCS operations." *Id.* 18a.

- "One of Staley's HFCS plant managers was heard to say: 'We have an understanding within the industry not to undercut each other's prices.'" *Id.* 16a.

- "A director of Staley was reported to have said that '*every* business I'm in is an organization' (emphasis added [by the court]) – which sounds innocuous enough, but he said it in reference to the conspiracy to fix the price of lysine ('lysine is an organization') and so in context it appears that 'organization' meant price-fixing conspiracy." *Id.* 17a.

- "A Staley document states that Staley will 'support efforts to limit [HFCS] pricing to a quarterly basis.' Presumably the reference is to efforts by its competitors." *Id.* 16a-17a.

- "Michael Andreas, the vice chairman and executive vice president of ADM, said: 'What are you gonna tell [Keough, the recently retired president of Coca-Cola], that we gotta [i.e., have a] deal with . . . our two biggest competitors to fuck ya over[?]'" *Id.* 17a. Defendants conceded before the district court that Staley and Cargill were ADM's two biggest competitors.

- "The president of ADM stated that 'our competitors are our friends. Our customers are the enemy.'" *Id.*

- "[A] director of Staley's parent company . . . said in a memo to Staley executives that 'competitors[']' happiness is at least as important as customers[']' happiness.'" *Id.*

- "Andreas, a principal figure in the lysine and citric-acid price-fixing conspiracies, also referred to Cargill's president as a 'friendly competitor' and mentioned an 'understanding between the companies that . . . causes us not to . . . make irrational decisions.'" *Id.*

- "Andreas compared the relations between ADM and Cargill to those between Mitsubishi and Mitsui, two Japanese conglomerates widely believed to fix prices and allocate markets." *Id.*

- "A handwritten Cargill document refers . . . to 'entry of new entrants (barriers) and will they play by the rules (discipline).' . . . [C]onspirators will naturally worry whether, if there is entry, the new entrant will join rather than compete with the conspiracy and, if he refuses to join, whether the conspirators can punish him in some way." *Id.* 17a-18a.

- "Shortly after the FBI raided ADM's headquarters seeking evidence of the company's involvement in the lysine and citric-acid conspiracies, Terrence Wilson, the head of ADM's corn processing division – the division responsible for HFCS as well as for the other two products – said he didn't know 'what other companies [the FBI] hit. . . . I don't know . . . if they hit Staley or not.' Since Staley did not manufacture lysine or citric acid, but did of course manufacture HFCS, Wilson may have been expressing a concern that the FBI would uncover evidence of an HFCS price-fixing conspiracy as well." *Id.* 18a.

While this evidence may not be "conclusive," *id.* 19a, taken as a whole, it is not "as consistent with" independent action as it is with an unlawful agreement to fix prices, *Matsushita*, 475 U.S. at 588. Taken as a whole, the evidence before the court below amounts to far more than "snippets." See Crg. Pet. 1, 12-13, 20, 29; St. Pet. 12, 17. As the court

below found, the evidence it evaluated readily met the standard articulated by this Court in *Matsushita* and *Monsanto*.

Thus, petitioners are wrong to state that the court below "simply refuse[d] to apply the rules that were set out by this Court in *Matsushita* and *Monsanto*," Crg. Pet. 12, and "declined to apply," "pointedly declin[ed] to apply," "brushed aside as dicta," or "departed fundamentally from" *Matsushita* or *Monsanto*, *id.* 2, 3, 8; St. Pet. 2. The court did not announce any "new legal standard," *id.* 4, nor did it make any new law. There is no language in the opinion of the court of appeals, as claimed by petitioners, "underscoring that its decision was . . . [the] application of a different legal standard than *Matsushita*," "[r]easoning [that] *Matsushita* cannot apply, or holding that, in this case, *Matsushita* was "rendered . . . moot." *Id.* 10-12. Petitioners' arguments are merely misleading hyperbole.[5]

2. Petitioners attempt to confuse the issues.

Petitioners attempt to confuse the issues by urging that *Matsushita* and *Monsanto* prohibit plaintiffs from defeating summary judgment with "ambiguous" circumstantial evidence, regardless of how much or how strong the evidence is when viewed as a whole. St. Pet. i, 1-4, 12-14, 16-17, 20-21; Crg. Pet. I, 2-3, 12, 16-17, 23; ADM Pet. i, 6,

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[5] There is no validity to Cargill's fanciful argument that the court of appeals "reason[ed]" that *Matsushita* "appl[ies] only in cases where the plaintiffs' allegations are inherently implausible as a matter of economic theory." Crg. Pet. 18-20; see also St. Pet. 14-15. The court below did apply *Matsushita*. The language referenced in Crg. Pet. 8-9 and St. Pet. 14 asserts only the truism that "[m]ore evidence is required the less plausible the charge of collusive conduct." Crg. App. 15a; see *Matsushita*, 475 U.S. at 587.

25-28. This is not the law announced in *Matsushita* and *Monsanto*.

Because conspiracies are by nature clandestine, they often can be proven only through circumstantial evidence. By definition, as the court below discussed, circumstantial evidence is susceptible to alternative interpretations.[6] Crg. App. 16a. But, as *Monsanto*, 465 U.S. at 764, and *Matsushita*, 475 U.S. at 588, make clear, juries in antitrust cases are permitted to draw reasonable inferences from circumstantial evidence even when individual pieces of such evidence contain some ambiguity. Petitioners fail to recognize that there are degrees of ambiguity and that circumstantial evidence can be significantly probative even though different inferences possibly could be drawn from it.

Thus, in *Monsanto*, the Court stated that "the antitrust plaintiff should present direct *or circumstantial* evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" 465 U.S. at 764 (citation omitted and emphasis added). Applying this test, this Court held that there was sufficient evidence of an antitrust conspiracy to go to the jury, relying in part on "ambiguous" statements in a distributor newsletter. *Id.* at 765-66. The Court recognized that the statements could be read either as an indication of an agreement or "a unilateral Monsanto pronouncement[ ]." *Id.* at 766 n.11. However, the Court

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[6] Petitioners suggest that the discussion in the decision below concerning the difference between "direct" and "circumstantial" evidence creates a division among the courts of appeals. Crg. Pet. 6, 26-28; St. Pet. 7. It does not. The Seventh Circuit did not suggest that the test in *Matsushita* should *not* be applied in a circumstantial evidence case, nor did it refuse to apply the test when other courts would have. Indeed, it concluded that respondents' case included circumstantial evidence, Crg. App. 16a, and applied *Matsushita*, *id.* 15a.

concluded, "The interpretation of these documents and the testimony surrounding them properly was left to the jury." *Id.* at 766.

Similarly, in *Matsushita*, after extensive discussion of the facts, this Court remanded to allow the court of appeals "to consider whether there is other evidence that is *sufficiently* unambiguous to permit a trier of fact to find" the alleged conspiracy. 475 U.S. at 597 (emphasis added). Thus, even though the Court had found the alleged conspiracy in that case to be economically implausible, it still did not require plaintiffs' evidence to be entirely unambiguous.

Matsushita therefore does not prohibit drawing from circumstantial evidence reasonable inferences favorable to the non-moving party on summary judgment in antitrust cases. 475 U.S. at 587. Indeed, it could not. See Rule 56(c), Fed. R. Civ. P. (containing no exception for antitrust cases).[7] "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Eastman Kodak*, 504 U.S. at 468.[8] *Matsushita*

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[7] As Justice Thomas wrote for the Court last term, a federal court is not free to bend the Federal Rules of Civil Procedure because of its views on the merits of a claim. See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514-15 (2002) (courts are not free to ignore Fed. R. Civ. P. 8(a) and impose a heightened pleading requirement in employment discrimination cases to weed out "unsubstantiated suits;" any different result "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation" (internal quotation and citation omitted)).

[8] Petitioners express concern that application of the ordinary standard for summary judgment in price-fixing cases will deter legitimate conduct. Crg. Pet. 3, 13, 29; St. Pet. 5, 13, 21; ADM Pet. 28. *Matsushita* involved a claimed conspiracy to predatorily price, that is, to price *lower*, and the Court noted the concern that the law not discourage legitimate price competition. 475 U.S. at

simply holds that evidence, when taken as a whole, as consistent with lawful as unlawful activity will not support an inference of an actionable antitrust conspiracy. See 475 U.S. at 577.

Moreover, petitioners appear to insist that each item of evidence be examined individually in isolation, rather than in the context of the totality of the evidence. This position was rejected by this Court over 40 years ago.

> [P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . "[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

Continental Ore Co. v. United Carbide & Carbon Corp., 370 U.S. 690, 699 (1962) (quoting *United States v. Patten*, 226 U.S. 525, 544 (1913)). This long-standing principle recognizes how people make decisions, considering not only the individual pieces of evidence, but also their interrelationship. For example, where four separate items of evidence when viewed together suggest conspiracy (albeit not conclusively), the case is obviously stronger than

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594. In contrast, the present case involves a claim of horizontal price-fixing for the purpose of inflating prices over their competitive levels. *Matsushita* recognized that in such cases there is "the desire that illegal conspiracies be identified and punished." *Id.* See also *Eastman Kodak*, 504 U.S. at 478 ("The alleged conduct – higher service prices and market foreclosure – is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this situation, *Matsushita* does not create any presumption in favor of summary judgment for the defendant.") In this respect, too, the Seventh Circuit's decision is consistent with *Matsushita*.

viewing each piece standing alone. Petitioners' arguments do not recognize this basic fact, which is one of the traps set by petitioners that the court of appeals explicitly recognized and took pains to avoid. Crg. App. 5a.

Petitioners also suggest that Judge Posner surreptitiously incorporated into the opinion below ideas from his antitrust text, *Antitrust Law* at 99-100 (2d ed. 2001), and permitted this case to go to a jury based on evidence sufficient only to support an inference of tacit collusion.[9] St. Pet. 3-4, ADM Pet. 27 n.14; Crg. Pet. 17. Whatever the merits of the views he expressed regarding tacit collusion in *Antitrust Law* at 93-100, Judge Posner applied well-established law here.[10] The opinion below expressly treated tacit collusion as "independent action." See Crg. App. 3a ("plaintiffs in this case concede that it must be an explicit, manifested agreement rather than a purely tacit meeting of the minds"); see also *id.* 14a. Judge Posner required respondents to show that "there is enough evidence for a reasonable jury to find that there was an explicit agreement, *not merely a tacit one*." *Id.* 15a (emphasis added). Obviously, this Court should not grant *certiorari* to correct what petitioners consider to be errors in Judge Posner's academic writing.[11]

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[9] This Court has repeatedly relied on Judge Posner's academic analysis of antitrust issues. See, *e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 725-26 (1988); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 48 n.13, 51 n.18, 53 n.21, 55, 56 & n.24 (1977).

[10] Contrary to petitioners' arguments, Crg. Pet. 17; St. Pet. 3-4; ADM Pet. 27 n.14, Judge Posner's major concern with the phrase "tends to exclude the possibility of independent action" is that "independent action" can refer to tacit collusion, not that as applied it prevents cases in equipoise from going to the jury. See *Antitrust Law* at 100.

[11] Moreover, when Judge Posner has disagreed with this Court's precedents, he has candidly stated his disagreement but always

There is no basis for believing that the Seventh Circuit did not apply the standard in *Matsushita* to the facts in this horizontal price-fixing case.[12]

B. The Court of Appeals' Decision Does Not Conflict With Any Other Circuit's Decision.

Not surprisingly, since the decision below involves just

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appropriately followed this Court's rulings. See *Kahn v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996) ("despite all its infirmities, its increasingly wobbly, moth-eaten foundations . . ., *Albrecht* [*v. Herald Co.*, 390 U.S. 145 (1968)] has not been *expressly* overruled . . . [a]nd the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are to leave the overruling to the Court itself"), rev'd 522 U.S. 3 (1997); see also *Scheiber v. Dolby Lab., Inc.*, 293 F.3d 1014, 1017, 1018 (7th Cir. 2002) (*Brulotte v. Thys Co.*, 379 U.S. 29 (1964), "has, it is true, been severely, and as it seems to us, with all due respect, justly, criticized . . . [H]owever, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems"), pet. for cert. pending, No. 02-689.

[12] Contrary to petitioners' insinuations, Crg. Pet. 29-30, St. Pet. 21, ADM Pet. 29, the Seventh Circuit has aggressively weeded out cases when it concludes they could coerce extortionate settlements because of their sheer size, despite their apparent lack of merit. See, *e.g.*, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (reversing class certification after considering the "intense pressure to settle" from "facing $25 billion in potential liability (conceivably more)"); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001) (Posner, J.) (one of the factors for exercising discretion to take an appeal under Rule 23(f), Fed. R. Civ. P., "is one in which the grant of class status places undue pressure on the defendant to settle regardless of the actual merit of the suit").

the factbound application of settled law, it does not conflict with the decision of any other circuit. The courts in the cases petitioners discuss at some length also applied the standard articulated by this Court in *Matsushita*. See *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1032 (8th Cir. 2000) ("*Potash*"); *In re Citric Acid Litig.*, 191 F.3d 1090, 1094 (9th Cir. 1999); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999); *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 904 (9th Cir. 1987) (Kennedy, J.).[13] Far from reflecting any "fundamental difference[ ] in . . . approach," Crg. Pet. 23; see also ADM Pet. 27, the different outcomes between the decision below and those discussed by petitioners merely reflect differences in the facts. Summary judgment was denied below because of the specific evidence adduced here, which was neither "essentially identical," Crg. Pet. 21, "cookie-cutter" evidence, *id.* 2, nor evidence "present in almost every significant antitrust suit," *id.* 12 (emphasis omitted). Petitioners' other cases contained nothing approaching the quality or quantity of the evidence present here.

Citric Acid. The Ninth Circuit affirmed the district court's ruling that the evidence was insufficient to link Cargill to the

[13] Each of the cases referenced without elaboration in St. Pet. 18-19 and ADM Pet. 25 did no more than apply *Matsushita* to the facts before it. See *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 858 (10th Cir. 1999); *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 569-70 (11th Cir. 1998); *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Tech., Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997); *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995); *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1167-68 (6th Cir. 1995); *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 513 (5th Cir. 1990); *Riverview Inv., Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474, 483 (6th Cir. 1990); *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1013-14 (2d Cir. 1989).

conspiracy to raise citric acid prices. 191 F.3d at 1106. Cargill takes false comfort from that opinion and argues that, because it obtained summary judgment in that case, it should have won summary judgment here. Crg. Pet. 22. Unfortunately for Cargill, the two cases are very different.

In *Citric Acid*, there was an admitted conspiracy to fix prices. 191 F.3d at 1097. However, not only was there no direct evidence linking Cargill to that conspiracy, but the admitted conspirators effectively exonerated Cargill, a new participant in the citric acid market with a rapidly rising market share at the time of the conspiracy.[14] None of the conspirators "identified Cargill as a co-conspirator," *id.* at 1106, and one of the high-level executives involved in the conspiracy testified specifically that Cargill did not attend the price-fixing meetings, *id.* at 1097. See also 996 F. Supp. at 955.

Cargill seeks to equate the *Citric Acid* evidence with that here. Crg. Pet. 22. It points to a single internal document in the files of one of the citric acid competitors, H&R, which said that H&R should try to "gain share at accounts" without affecting the "ADM, Cargill, JBL shares," 191 F.3d at 1103. Crg. Pet. 22. The Ninth Circuit found this document to be as consistent with Cargill's legitimate behavior as with illegal behavior, because H&R had repeatedly lost business when it went head-to-head with Cargill due to Cargill's lower prices. *Id.* at 1104.

The evidence here is far different and far stronger. Cargill, one of the three largest HFCS producers, adopted the

[14] Cargill's "market share rose from 0% in 1990 to about 20% by the mid-1990's," *In re Citric Acid Litig.*, 996 F. Supp. 951, 954 (N.D. Cal. 1998), aff'd, 191 F.3d 1090, 1094 (9th Cir. 1999), and "the only market share data actually in the record . . . indicates that Cargill's market share continued to increase even after 1993," 191 F. 3d at 1102 n.7.

90% rule and quarterly pricing just as other HFCS producers did, and its market share throughout the alleged conspiracy period was suspiciously steady.[15] Cargill made HFCS purchases from ADM and Staley when Cargill had excess capacity and could have manufactured the HFCS it bought at a lower price, which Judge Posner recognized as "a way of shoring up a sellers' cartel by protecting the market share of each seller." Crg. App. 12a. Andreas compared ADM's and Cargill's relations to those of Japanese conglomerates widely believed to fix prices and allocate markets, and he said that ADM had an "understanding" with Cargill not to "make irrational decisions," and, in particular, a "deal" with its two biggest competitors, including Cargill, to "fuck" Coke, one of the largest HFCS purchasers.

Richards. The plaintiff there was a small, local nonunion "destination" trucking company with whom several larger union "origin" trucking companies severed their joint-trucking relationships. 810 F.2d at 900-01. The plaintiff sued, claiming the refusals to deal were the product of a conspiracy among the origin truckers not to deal with local destination truckers who "back solicited" – or stole – their customers by offering to cut the larger origin truckers out of future orders. *Id.* at 901. The Ninth Circuit correctly found that each defendant trucker had an independent reason not to

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[15] Cargill's HFCS market share was so steady over the entire six-and-a-half-year effective period of the alleged conspiracy that its turnover index was less than the norm for competitive markets found by Neil H. Jacoby in *The Relative Stability of Market Shares: A Theory and Evidence from Several Industries*, 12 J. Indus. Econ. 82 (1964). See Declaration of Gordon C. Rausser, dated January 21, 1998, Table 2-1, in the record before the courts below. According to *petitioners'* economic expert, who relied on Professor Jacoby's analysis, "[a] low turnover index, by itself, would have yielded proper grounds for prosecution" for violation of the antitrust laws. Kenneth G. Elzinga, *New Developments on the Cartel Front*, 29 Antitrust Bulletin 3, 19 (Spring 1984).

deal with back-soliciting truckers – namely, it did not want its customers stolen. *Id.* at 903. Further, there was no evidence of "interdependence" among the larger truckers, and no evidence that any larger trucker had severed its ties with plaintiff in response to back solicitation of a different origin trucker's customers. *Id.* at 904. There also was no allegation that, in the absence of a conspiracy among origin truckers, bilateral agreements between origin and destination truckers not to back solicit were unlawful. *Id.*

Against this background, the Ninth Circuit found "as consistent with" lawful as unlawful action, *id.*, the single piece of evidence introduced by plaintiff to support its allegation of conspiracy: deposition testimony by one defendant's official stating that, for 30 or 40 years, there had been a "gentleman's agreement" that competitors would not engage in back solicitation and steal customers, *id.* at 903.

The case below is not analogous to *Richards*. The evidence of conspiracy detailed by Judge Posner is both qualitatively and quantitatively much stronger.

Potash. That case arose against the background of a determination by the United States Department of Commerce that Canadian producers were dumping potash in the United States at prices below fair market value. 203 F.3d at 1031. The anti-dumping determination led the Department of Commerce to negotiate a Suspension Agreement with each of the Canadian producers, thereby raising potash prices by setting a price floor. *Id.* at 1031-32.

Moreover, the government-negotiated pricing agreement coincided with a change in the operation of the leading potash producer from a government-operated Saskatchewan company seeking to maintain local employment to one seeking to maximize profits by raising prices and reducing output. *Id.* at 1031, 1034. (In contrast here, at the outset of

the alleged conspiracy, the largest HFCS producer, ADM, came under the control of a subsequently convicted price-fixer, Wilson.)

Nonetheless, Cargill asserts that the evidence it describes from *Potash* was "essentially identical" to the evidence here. Crg. Pet. 21. However, the evidence reviewed by the court in *Potash* was much weaker and in a far different context.

The Eighth Circuit looked first at "sporadic" inter-firm price verifications that occurred during the alleged conspiracy. *Id.* at 1034. However, these communications lacked any nexus to changes in price. *Id.* at 1035. They did not take place before price increases – so they were not designed to facilitate them. See *id.* at 1033-34.

The court also examined a document sent to agents of one group of potash producers describing several days in advance the new price list of a large competitor that would take effect January 11. *Id.* at 1035. But, as the Eighth Circuit described, "[T]he producers did not uniformly increase prices to match the memorandum on January 11, 1988, and furthermore, one producer, Kalium, did not match the memorandum price at all." *Id.* at 1036. Having found that the potash producers failed to act as conspirators would be expected to act, the Eighth Circuit unsurprisingly concluded that the evidence was as consistent with lawful activity as with an unlawful conspiracy. *Id.* at 1032, 1038.

Baby Food. That case, too, was far weaker than the one at bar. Of the three companies that accounted for over 98% of the baby food sold in the United States, Gerber was the market leader selling 70% of the volume nationwide, Heinz was a lower-priced brand with a strong presence only in the central midwest and southwest, and Beech-Nut was a higher-priced brand with a strong presence only in New England, New York and eastern Pennsylvania. 166 F.3d at 116-17.

Baby food, unlike HFCS, is not a standardized item. There were more than 500 baby food products, making coordination among competitors more difficult. *Id.* at 116. Thus, in *Baby Food*, "the defendants' prices were not parallel." *Id.* at 128. On that "basis alone," the district court found "plaintiffs' case fails," and the court of appeals "perceive[d] no error" in that conclusion. *Id.*

The Third Circuit also found that "there [wa]s positive and unequivocal evidence that the defendants engaged in unilateral, aggressive competition limited only by budgetary considerations, cash and market conditions." *Id.* at 138. Indeed, the court observed that, during nine of ten years of the alleged conspiracy, Beech-Nut, which was at the time owned by Nestle, *made no profit* under the allegedly fixed prices. *Id.* at 137. The court found, "It is inconceivable that with losses running at least 10% for every case sold, Nestle would have remained a party to a conspiracy to fix prices, preserve Gerber's market share year after year, and run up its own losses." *Id.*

In the face of these bedrock factual distinctions, Cargill points to an "exchange[] [of] future price information with various sales representatives" of competitors in *Baby Food*, *id.* at 119. Crg. Pet. 21. However, the Third Circuit found that there was no evidence that these "exchanges of shop talk among field sales representatives who lack[ed] pricing authority" "had an impact on pricing decisions." 166 F.3d at 125.

Petitioners also cite a single memorandum from Beech-Nut's files referring to a "truce." Crg. Pet 21; St. Pet. 20. The Third Circuit, though, concluded first that there was no evidence that the memorandum referred to Gerber, which would have been indispensable to any conspiratorial agreement. 166 F.3d at 126. That court then found that, even with respect to the two minor players in the alleged

conspiracy, Beech-Nut and Heinz, "the single use" of the term "truce" in a memorandum, "which relates ostensibly to business competition and not price-fixing," "in the face of continuing fierce competition" after the end of a brutal price war "is as consistent with independent behavior as it is with price-fixing." *Id.* at 127.

The facts in *Baby Food*, where even the most basic evidence of conspiracy was absent, are a far cry from those here.

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A panel of experienced jurists on the court below carefully reviewed the record and concluded that "the overall evidence of conspiracy . . . was abundant although not conclusive," Crg. App. 4a, and "highly suggestive of the existence of an explicit though of course covert agreement to fix prices," *id.* 19a. Because this determination is nothing more than a routine application of *Matsushita* and *Monsanto* to a particular set of facts, and therefore consistent with other circuits' cases, review should be denied.

II. The Tangential Evidentiary Issue Concerning The Invocation Of The Fifth Amendment Does Not Warrant Review.

Although unnecessary to its decision reversing summary judgment, Crg. App. 19a, the Seventh Circuit addressed and reversed the district court's ruling that no inference could be drawn against ADM from the invocation of the Fifth Amendment by its former executives, Andreas and Wilson. In questions 1 and 2 in its petition, ADM seeks review in this Court based on a non-existent circuit split.

Andreas was vice chairman and executive vice president of ADM during the time of the alleged conspiracy. *Id.* 17a.

Wilson was the head of ADM's corn products division and in charge of ADM's HFCS operations. *Id.* 18a. "After Andreas and Wilson were convicted and sent to prison for fixing the price of lysine, the plaintiffs deposed them and asked them whether they had fixed prices of HFCS as well. They . . . refused to answer on the ground that their answers might incriminate them."[16] *Id.* 19a.

The district court held that the refusal to answer could not support an inference of the existence of a conspiracy "particularly in light of the absence of other evidence in the record confirming Plaintiffs' conspiracy theory." *Id.* 41a. It reasoned that, once a witness invoked the Fifth Amendment in answer to *all* questions, as Andreas and Wilson did, "it is 'impossible to draw a negative inference from his refusal to answer any given question, as it would be if his assertion of the privilege had been selective.'" *Id.* 40a-41a (quoting *Ullman-Briggs, Inc. v. Salton/Maxim Housewares, Inc.*, 1996 U.S. Dist. LEXIS 13621, *50, 1996 WL 535083, at *17 (N.D. Ill. 1996)).

The court of appeals properly reversed. First, it concluded that there indeed was other evidence of an HFCS conspiracy sufficient to provide a foundation for an inference of conspiracy from the invocation of the Fifth Amendment. *Id.* 19a. Then, it rejected the district court's conclusion that an inference may be avoided when a witness (following the usual practice) refuses to answer *all* questions, rather than selectively invoking the privilege. It found that the district court's ruling wrongly "assume[d] that a person has carte blanche by virtue of the Fifth Amendment's self-incrimination clause to refuse to answer questions." *Id.* 19a-

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[16] ADM pled guilty to criminal antitrust charges of fixing prices in the lysine and citric acid industries and paid a $100,000,000 fine. Crg. App. 30a.

20a (citing *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980)). The court below concluded:

> Andreas and Wilson . . . faced no further jeopardy – unless truthful answers to questions about the HFCS conspiracy would have tended to show that ADM had conspired to fix the price of that product as well. That would justify and explain their taking the Fifth and it would also entitle a jury to treat their refusal to answer as evidence that there indeed was such a conspiracy.

Id. 20a.[17]

A. In a Civil Case, an Inference May Be Drawn From the Invocation of the Fifth Amendment.

In criminal cases, no inference may be drawn against a defendant from the invocation of the Fifth Amendment. See *Griffin v. California*, 380 U.S. 609, 615 (1965). In civil cases, properly drawn inferences from an invocation of the Fifth Amendment may be used as evidence. See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). "[A]side from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause." *Id.* at 319. See also *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) (citing *Baxter*) (courts may "draw adverse inferences

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[17] This conclusion is consistent with the language ADM quotes from *Ohio v. Reiner*, 532 U.S. 17, 20-21 (2001) (per curiam), in ADM Pet. 10-11. As the language quoted in the text makes clear, what the court below was saying was that "a responsive answer to the question[s] or an explanation of why [they could not] be answered [could have been] dangerous," 532 U.S. at 21 (internal quotation and citation omitted), only if ADM had conspired to fix HFCS prices.

from [a] refusal to answer questions . . . in a civil proceeding without offending the Fifth Amendment").[18]

B. There Is No Circuit Split On Drawing Inferences From a Non-Party's Invocation of the Fifth Amendment.

In this case, the court of appeals held that an inference could be drawn against a corporation from the invocation of the Fifth Amendment by two of its former highest-ranking executives in response to questions concerning their involvement in illegal price-fixing activities as part of their jobs for the corporation. There is no split of authority among the circuits concerning the standard for determining the admissibility of an invocation of the Fifth Amendment by such non-parties to allow an adverse inference against a party.

In *Brink's Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983), the Second Circuit found that "[t]he fact that the invokers of the privilege are no longer employees of the defendant does not necessarily bar admittance of their refusals to testify as vicarious admissions of their former employer." It then held that the invocations were admissible under Rule 403, Fed. R. Evid., as the probative value of the evidence was not substantially outweighed by the danger of

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[18] ADM's argument that, because the invocation is not "sworn" and "cannot be cross-examined," it is not trustworthy, ADM Pet. 9, 19, was already rejected by this Court in *Baxter*, when it permitted such invocations to be used in evidence in civil cases.

ADM also argues that one might lawfully refuse to answer a question on Fifth Amendment grounds when it would "furnish a link – which itself could be wholly innocuous – in a chain of evidence that could lead to prosecution." ADM Pet. 20. ADM cannot explain how an assertion by Andreas or Wilson that they had *not* participated in a conspiracy to fix HFCS prices could amount to such a link.

unfair prejudice. *Id.* In *RAD Serv., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275-77 (3d Cir. 1986), the Third Circuit held that former employees' invocations may be introduced against their employer under Rule 403, where "questions put to them pertained solely to events occurring while they worked for RAD" and the record was "replete with circumstantial evidence of [their] involvement." In *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481-82 (8th Cir. 1987), the Eighth Circuit held that a former director's invocation was admissible under Rule 403 against a non-profit corporate entity, where the invocation "made it more probable [under Rule 401, Fed. R. Evid.] that [the former director] had committed the acts in question" "when considered in relation to other key evidence introduced at trial." Finally, in *FDIC v. Fidelity & Deposit Co. of Maryland*, 45 F.3d 969, 978 (5th Cir. 1995), the Fifth Circuit held that invocations by non-employee witnesses who had a relationship with an allegedly defalcating employee were admissible under Rule 403 against the latter's employer, and, because the evidence was relevant and corroborated by other evidence, could be the basis of an adverse inference. In each of these cases, as here, the courts applied the same standard, looking at the facts and circumstances to determine "whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." *LiButti v. United States*, 107 F.2d 110, 124 (2d Cir. 1997).[19]

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[19] Twenty-year-old *dissents* in *Brink's*, 717 F.2d at 715, and *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 245 (3d Cir. 1983), relied on in ADM Pet. 10, 14-15, 18 n.10, and 20 n.11, do not create a circuit split. In any event, their approach to the evidentiary significance of invocations of the Fifth Amendment was rejected by the Court in *Baxter* as Justice Scalia, joined by Chief Justice Rehnquist, Justice O'Connor and Justice Thomas, recently explained in his dissent in *Mitchell v. United States*, 526 U.S. 314, 331, 332 (1999) (a refusal to permit an adverse inference from a refusal to testify on Fifth

ADM relies on *Veranda Beach Club L.P. v. Western Sur. Co.*, 936 F.2d 1364 (1st Cir. 1991), in an unsuccessful attempt to create the appearance of a split. ADM Pet. 16. In that case, plaintiff FRG Ventures, Inc. propounded requests for admission to defendant EWM Co. Responding on behalf of EWM, Robert Mongillo refused to answer a number of requests in reliance on his privilege against self-incrimination. *Id.* at 1373-74. The First Circuit *held* that the district court had not abused its discretion in refusing to allow the introduction of the requests and responses, "because they were cumulative; the information sought through the requests had already been conclusively established in other ways." *Id.* at 1374.

Only as an alternative holding, the First Circuit said that "[i]n a civil case . . . an individual's invocation of a personal privilege against self-incrimination cannot, *without more*, be held against his corporate employer *in circumstances analogous to those at bar*." *Id.* (emphasis added). The court rejected the proposition that an invocation of the Fifth Amendment by an employee designated to answer requests for admissions could automatically be held against his employer. *Id.* It concluded that a corporation's designation of an employee to respond to requests for admission and that employee's invocation of his personal right not to speak – the only basis FRG presented for drawing an inference against EWM from Mongillo's invocation – is inadequate *without more* to create an inference of the corporation's wrongdoing. *Id.*

Far from standing for the proposition that "the Fifth Amendment invocation by an officer of a corporation that was a party to the case could not be held against the

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Amendment grounds "runs exactly counter to normal evidentiary inferences").

corporation," ADM Pet. 16, *Veranda Beach* holds only that the mere relationship between the party corporation and its employee is insufficient by itself to permit an adverse inference from the employee's invocation. This is entirely consistent with the other courts of appeals' holdings (including the Seventh Circuit's here) that an inference may be drawn where there is other evidence supporting the logic and evincing the relevance and trustworthiness of the inference. This is how *Veranda Beach* has been understood in the First Circuit:

> *Veranda Beach* establishes no per se rule which insulates a corporate employer from any adverse inference based on an employee's invocation of his Fifth Amendment privilege. Rather, the court demanded that such an inference be based on something more than the mere existence of an employment relationship.

Data General Corp. v. Grumman Sys. & Support Corp., 825 F. Supp. 340, 352 (D. Mass. 1993).

There is no circuit split, and there is no reason for this Court to grant *certiorari* on the question of whether the Seventh Circuit correctly permitted an inference against ADM from Andreas' and Wilson's invocations of the Fifth Amendment in response to questions about their actions as executives on behalf of ADM.[20]

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[20] ADM Pet. 16-22 urges this Court to grant *certiorari* to pronounce some novel rule to govern inferences from invocations, which rule it is unable to articulate, but which would presumably differ from the uniform rule adopted by six circuit courts of appeals, including the court below. This amorphous argument cannot justify granting *certiorari* here.

C. The Interlocutory Posture of the Decision on the Invocation of the Fifth Amendment Renders It Inappropriate for *Certiorari* Review.

In any event, this issue is presented in an interlocutory posture that makes it inappropriate for this Court's review. Petitioner ADM concedes that the evidentiary ruling on the invocation of the Fifth Amendment was not necessary to the Seventh Circuit's decision on summary judgment. ADM Pet. at 6. Consequently, the significance of these invocations remains to be seen. Review, if it would be warranted at all, would therefore be appropriate only after a final judgment is entered. See, *e.g.*, *Am. Constr. Co. v. Jacksonville T., & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) ("this court should not issue a writ of *certiorari* to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct in the conduct of the cause"). As Justice Scalia wrote in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."

CONCLUSION

ADM's, Cargill's and Staley's petitions for *certiorari* in Nos. 02-692, 02-705 and 02-736, respectively, should be denied.

Respectfully submitted,

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